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IN THE

Supreme Court of the United States

GREGORY L. HERRING, JR., A MINOR CHILD, BY AND THROUGH HIS GUARDIAN AD LITEM, SUSAN FORT, ESQ.; SUMMER HERRING, A MINOR CHILD, BY AND THROUGH HER GUARDIAN AD LITEM, SUSAN FORT, ESQ.; AND GREGORY Q. HERRING, A MINOR CHILD, BY AND THROUGH HIS GUARDIAN AD LITEM, SUSAN FORT, ESQ.,

Petitioners,

v.

THE CITY OF COLORADO SPRINGS, A MUNICIPAL ENTITY; GARY DARRESS, INDIVIDUALLY AND IN HIS CAPACITY AS A COLORADO SPRINGS POLICE OFFICER; RORY CARROLL, INDIVIDUALLY AND IN HIS CAPACITY AS A COLORADO SPRINGS POLICE OFFICER; BRENT AMBUEHL, INDIVIDUALLY AND IN HIS CAPACITY AS A COLORADO SPRINGS POLICE OFFICER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the imposition of an intent based state-of-mind requirement in a claim for deprivation of a Fourteenth Amendment right of familial association brought pursuant to 42 U.S.C. § 1983 is contrary to *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (U.S. 1998) which holds there is no state of mind requirement as a prerequisite to a 1983 claim.

2. Whether the imposition of an intent based state-of-mind requirement in a claim for deprivation of a Fourteenth Amendment right of familial association brought pursuant to 42 U.S.C. § 1983 is contrary to *Daniels v. Williams*, 474 U.S. 327, 330 (U.S. 1986) which holds that a Fourteenth Amendment claim may be based on conduct greater than negligence but "less than intentional conduct."

3. Whether the Tenth Circuit's holding in *Trujillo v. Board of County Comm'rs,* 768 F.2d 1186, 1190 (10th Cir. 1985), imposing an intent based state-of-mind requirement in a claim for deprivation of a Fourteenth Amendment right of familial association brought pursuant to 42 U.S.C. § 1983, is in conflict with the rulings of other circuits that do not impose a strict intent requirement on such claims. *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1992); *Patel v. Searles*, 305 F.3d 130 (2d Cir. 2002)

PARTIES TO THE PROCEEDINGS

Petitioners are Gregory L. Herring, Jr., A Minor Child, by and through his Guardian Ad Litem, Susan Fort, Esq.; Summer Herring, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and Gregory Q. Herring, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.

Respondents are The City of Colorado Springs, a municipal entity; Gary Darress, individually and in his capacity as a Colorado Springs Police Officer; Rory Carroll, individually and in his capacity as a Colorado Springs Police Officer; Brent Ambuehl, individually and in his capacity as a Colorado Springs Police Officer.

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IN THE

Supreme Court of the United States

No. ___

GREGORY L. HERRING, JR., A MINOR CHILD, BY AND THROUGH HIS GUARDIAN AD LITEM, SUSAN FORT, ESQ.; SUMMER HERRING, A MINOR CHILD, BY AND THROUGH HER GUARDIAN AD LITEM, SUSAN FORT, ESQ.; AND GREGORY Q. HERRING, A MINOR CHILD, BY AND THROUGH HIS GUARDIAN AD LITEM, SUSAN FORT, ESQ.,

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THE CITY OF COLORADO SPRINGS, A MUNICIPAL ENTITY; GARY DARRESS, INDIVIDUALLY AND IN HIS CAPACITY AS A COLORADO SPRINGS POLICE OFFICER; RORY CARROLL, INDIVIDUALLY AND IN HIS CAPACITY AS A COLORADO SPRINGS POLICE OFFICER; BRENT AMBUEHL, INDIVIDUALLY AND IN HIS CAPACITY AS A COLORADO SPRINGS POLICE OFFICER,

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her Guardian Ad Litem, Susan Fort, Esq.; and Gregory Q. Herring, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is an unpublished decision reported as *Estate of Herring v. City of Colo. Springs*, 2007 U.S. App. LEXIS 11775 (10th Cir. 2007), it is reproduced in the Appendix at App. C, page 98a. The opinion of the District Court granting Respondents' Motion for Summary Judgment is unreported and is reproduced in the Appendix at App. A, page 1a.

JURISDICTION

The Court of Appeals judgment was entered on May 18, 2007. Appendix at App. B at 59a. A timely petition for rehearing was denied on July 12, 2007, Appendix at App. C, page 63a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

2. 42 U.S.C. § 1983 provides: [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT

Petitioners seek review of the ruling of the Tenth Circuit Court of Appeals which imposed a strict intent requirement on a claim for deprivation of a Fourteenth Amendment right of familial association brought pursuant to 42 U.S.C. § 1983. Petitioners seek review of the Tenth Circuit's ruling because it is in conflict with the rulings of this court which specifically provide there is no state of mind requirement as a prerequisite to a 1983 claim, and that a Fourteenth Amendment claim may be based on conduct greater than negligence but "less than intentional conduct." *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (U.S. 1998); *Daniels v. Williams*, 474 U.S. 327, 330 (U.S. 1986)

The ruling of the Tenth Circuit Court of Appeals is also in conflict with the rulings of other circuits that do not impose a strict intent requirement on a claim for deprivation of a Fourteenth Amendment right of familial association brought pursuant to 42 U.S.C. § 1983. *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1992) (refusing to impose the Tenth Circuit's limitation requiring proof of specific intent to interfere with the family relationship); *Patel v. Searles*, 305 F.3d 130 (2d Cir. 2002) ("this Circuit has never held that a challenged action must be directed at a protected relationship for it to infringe on the right to intimate association").

On May 2, 2003, Gregory L. Herring, referred to as the decedent, died while in the custody of the Colorado Springs Police Department. On May 2, 2003, the decedent suffered an acute mental health crisis. Colorado Springs police officers responded to the apartment the decedent shared with his minor children. Prior to reaching the apartment, the officers were informed of the decedent's behavior, and that his minor children lived in the home. Colorado Springs police officers initiated a physical confrontation. Mr. Herring died during this confrontation due to a crushed trachea and resulting respiratory arrest.

Since at least 1997, the Tenth Circuit has recognized that police officer contact with the mentally ill is a common, usual and recurring situation for police officers. *Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997) As of 2003, the Colorado Springs Police Department recognized officer contact with the mentally ill was a foreseeable part of police work in the City of Colorado Springs. At the time of the incident, there were approximately 50,000 mentally ill persons in Colorado Springs out of a population of 400,000. For decades the accepted standard of care required police officers to recognize and train for contact with the mentally ill.

Among the assessments and judgments an officer must make in arriving on a scene is whether the person being contacted is "suffering from some type of crisis or behavioral disturbance or mental illness." The way in which an officer reacts to a situation involving a mentally ill person is "paramount in either resolving a crisis effectively or escalating an already volatile situation." An officer must consider how his or her actions will escalate or de-escalate the

conflict. Part of an officer's role, particularly in relation to the mentally ill is to deescalate the situation. An officer should attempt to deescalate before the use of force.

The initial dispatch of officers to the Herring residence was sufficient to put a reasonably trained officer on notice he/she was contacting a mentally ill person. The officers were informed: 1) a reporting party was inside his apartment with a neighbor outside banging on the front door; 2) no weapons were involved; 3) the altercation was a verbal rather than a physical altercation; 4) the suspect was Greg Herring, an African American male, six foot two inches tall weighing 240 pounds; 5) the initial report was of no injury; 6) the suspect lives in apartment north of the reporting party's; 7) "Kids now running away from the apartment."; 8) Greg is now nude, in his own apartment with bleeding arms; 9) second notification from dispatch (third overall notice) that the children had fled the apartment.

Officer Darress was the first officer present on the scene. Upon arrival Officer Darress spoke with a third party who directed Officer Darress to Mr. Herring's first floor apartment, and told Officer Darress the children had left the apartment. Officer Darress came to a window on the east side of the complex and contacted a nude black man who was bleeding from his arm and had a cut on his stomach. Officer Darress was inches to a foot from the window at this time. Mr. Herring "mumbled or muttered something about war, something about you being the police, you may be here to hurt me." He told Officer Darress the children had left. Officer Darress was told on four separate occasions, from three separate

sources that children lived in the apartment with the decedent but that they had left the apartment.

While Mr. Herring continued to throw items out of the window he did not throw them at Officer Darress. Officer Darress described Mr. Herring's behavior as "bizarre behavior", "abnormal behavior", "totally out of the ordinary behavior." "Any trained police officer would have recognized Herring as exhibiting characteristic symptoms of being extremely emotionally disturbed and/or mentally ill. . ."

Officers Ambuehl and Carroll arrived approximately a minute after Officer Darress. Officer Darress instructed the other officers to kick in the door. Officer Carroll indicated he made no attempts to deescalate the conflict prior to officers kicking in the door. After kicking in the door, Officers Carroll and Ambuehl entered the apartment, and moved toward Mr. Herring, checking rooms as they went. No person other than Mr. Herring was found in the rooms they checked. During this time, Mr. Herring continued to speak with Officer Darress, making statements with religious overtones, referencing war and stating Officer Darress was there "to hurt him."

When the officers made contact with Mr. Herring, Officer Carroll noted him to be making statements that fit the description of a person suffering mental illness. Officer Carroll believed Mr. Herring was suffering some type of mental illness.

After seeing the officers, Mr. Herring threw an object at Officer Carroll and missed. Officer Darress instructed Officer Carroll to "Spray him." Pursuant to Officer Darress' instructions, Officer Carroll sprayed Mr. Herring with a chemical agent. After being sprayed, Mr. Herring states "now we are all

going to die" and approached Officer Carroll. He did not charge or otherwise engage in any hand-to-hand physical confrontation with police until after he had been sprayed. He did not move toward the officers until after he had been sprayed. Up until that time the only aggressive act he had taken toward the officers was to throw an object at the officers and miss.

During the physical confrontation, Officer Carroll struck Mr. Herring with his fists multiple times. Officer Darress struck Mr. Herring 5-6 times with his fist and struck Mr. Herring with a "flat Chop" with his PR-24 tactical baton. Officer Darress recognized that blows or other contact with a suspect's neck could "cause severe injury or maybe even death." Contact with a suspect's neck could be considered deadly force. Officer Darress indicates he jammed his thumb into the right/middle side of Mr. Herring's neck and applied "quite hard" force for approximately 30 seconds. This application of force crushed Mr. Herring's trachea resulting in respiratory arrest and eventual death.

On April 30, 2004, the decedent's minor children Gregory L. Herring (DOB March 27, 2003), Summer Herring (DOB August 26, 1994), and Gregory Q. Herring (DOB October 10, 1995) together with the decedent's estate filed a Complaint in El Paso County District Court. Among the claims alleged by Plaintiffs, the Petitioners herein (referred to hereafter as "Petitioners") was a violation of the Petitioners' Fourteenth Amendment rights to familial association. On October 28, 2004, Petitioners filed an Amended Complaint in El Paso County District Court. (Appendix at App. H page 535a) This Complaint alleged in

part a violation of the Plaintiffs'-Appellants' Fourteenth Amendment rights to familial association.

On November 23, 2004, this action was removed by Defendants, the Respondents herein (referred to hereafter as Respondents), to the U.S. District Court, District of Colorado. Petitioners filed a Second Amended Complaint on May 2, 2005. (Appendix at App. I page 554a) This Complaint again alleged a violation of the Petitioners Fourteenth Amendment rights to familial association.

On February 2, 2006, by order of the United States District Court of Colorado, Honorable Magistrate Judge Patricia A. Coan, Respondents' Motion for Summary Judgment was granted as to all claims excepting claims made on behalf of the decedent's estate against Defendant Darress alleging excessive force. (Appendix at App. A page 1a) In dismissing Petitioners' Fourteenth Amendment familial association claim, the Court did not perform a Fourteenth Amendment balancing test. Rather, the Court premised dismissal on Plaintiffs' failure to show "intent" directed towards the familial relationship as required by *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985) The Court did not evaluate whether the conduct alleged, while less than intentionally directed toward the familial relationship, was nonetheless sufficient to state a claim.

A three judge panel of the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial Court in an Opinion and Judgment entered May 18, 2007. (Appendix at App. B page 59a) Citing to *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985), the panel's decision affirmed the application of a strict intent standard to Fourteenth Amendment familial relationship claims.

The decision stated: "[i]n *Trujillo*, 768 F.2d at 1190, we conclude[d] that an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under section 1983."

Petitioners' Petition for rehearing en banc was denied on or about July 12, 2007. (Appendix at App. C page 63a).

REASONS FOR GRANTING OF PETITION

A. The Decision in the Court Below Demonstrates a Split Between the Circuits.

The ruling of the Tenth Circuit Court of Appeals is in direct conflict with the rulings of the Ninth Circuit and Second Circuit that do not impose a strict intent requirement on a claim for deprivation of a Fourteenth Amendment right of familial association brought pursuant to 42 U.S.C. § 1983. *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1992) (refusing to impose *Trujillo's* limitation requiring proof of specific intent to interfere with the family relationship); *Patel v. Searles*, 305 F.3d 130 (2d Cir. 2002)("this Circuit has never held that a challenged action must be directed at a protected relationship for it to infringe on the right to intimate association) This split in the circuits causes persons of different circuits to be treated inconsistently relating to matters of a fundamental right and requires resolution by this Court.

The ruling of the Tenth Circuit Court of Appeals was based on *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985). In *Trujillo*, the Tenth Circuit recognized a right to intimate association as "an intrinsic element of personal liberty."

id. at 3251 However, the *Trujillo* Court was not clear regarding the source of the right to familial association.[1] *Trujillo* seemed to premise the right of familial association on the Fourteenth Amendment, but applied a First Amendment intent based test. Rather than analyze claims relating to familial relation pursuant to Fourteenth Amendment case law, the *Trujillo* court imposed an intent based test required of First Amendment expressive association.

Subsequent to *Trujillo*, The Tenth Circuit clarified the source of the right to familial relationship in *Griffin v. Strong*, 983 F.2d 1540, 1547(10th Cir. 1993). The *Griffin* court recognized "the familial right of association is properly based on the "concept of liberty in the Fourteenth Amendment." *Id.* at 1547. The *Griffin* court indicated that the proper analysis was the "classic fourteenth amendment analysis" which required a balancing of liberty interests against the relevant state interests. *Id.* at 1547 (quoting *Youngberg v. Romero*, 457 U.S. 307, 321 (1982)).

However, the *Griffin* Court applied the exact same test as *Trujillo*, stating, "[n]ot every statement or act

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[1] The Tenth Circuit's failure to resolve this issue created confusion and inconsistency among courts who looked to *Trujillo* for guidance. For example, the Fourth Circuit has cited *Trujillo* for the proposition that the right of familial association arises out of the First Amendment in *Rucker v. Harford County*, 946 F.2d 278, 282 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1175 (1992), while the Seventh Circuit contends that *Trujillo* based this same right on the Fourteenth Amendment. *See Mayo v. Lane*, 867 F.2d 374, 375 (7th Cir. 1989). The Tenth Circuit itself has not been immune to this confusion. In *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445 (10th Cir. 1990), the court of appeals perfunctorily suggested that *Trujillo* established a First Amendment right. *Id. at 1448.*

that results in an interference with the rights of intimate association is actionable. Rather, to rise to the level of a constitutional claim, the defendant must direct his or her statements or conduct at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship." *Griffin v. Strong,* 983 F.2d 1540, 1547 (10th Cir. 1993)

The Ninth Circuit has specifically rejected the type of strict intent standard adopted by the Tenth Circuit in *Trujillo.* In *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1992) the Ninth Circuit specifically addressed and rejected the *Trujillo* standard stating: "*Trujillo* approved a potentially larger group of plaintiffs, but limited that group by requiring them to prove a wrongful intent directed specifically at them. Neither *Bell*[2] nor *Smith* imposed any such limitation, and we are unwilling to do so here." *Ward*, 867 F.2d at 283.

The split between the Ninth and Tenth Circuits on this issue is well recognized by the district courts attempting to adjudicate familial relationship claims:

> [T]he Ninth Circuit has consistently recognized that its precedent recognizes a Fourteenth Amendment liberty interest of parents in the

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[2] *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). The Seventh Circuit specifically overturned *Bell* in *Russ v. Watts*, 414 F. 3d 783 (7th Cir. 2005) Citing *Trujillo* and other similar cases, the court overruled its *Bell* decision insofar as it recognized a constitutional right to recover for the loss of the companionship of an adult child when that relationship was terminated as an incidental result of state action. The Seventh Circuit's case law was now consistent with the Tenth Circuit's, but became inconsistent with that of the Second and Ninth Circuits.

> companionship and society of their adult children, even when the deprivation of that interest is incidental to the state action. *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004); *Lee v. City of Los Angeles*, 250 F.3d 668, 685-86 (9th Cir. 2001) (citing *Kelson*); *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir. 1998) (citing *Curnow*); *Byrd v. Guess*, 137 F.3d 1126, 1134 (9th Cir. 1998) (citing *Curnow*); and *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1992)
>
> In *Ward*, the Ninth Circuit acknowledged the Tenth Circuit's holding in *Trujillo* that although a mother and sister had a constitutional liberty interest in the companionship and society of the decedent, they needed to prove a wrongful intent specifically directed at them before they were entitled to recover. The Ninth Circuit, however, adopted what it labeled as the "earlier and better rule of *Bell*," refusing to impose *Trujillo's* limitation requiring proof of specific intent to interfere with the family relationship (i.e., parent-child relationship). The Ninth Circuit indicated that *Bell* was consistent with its decision in *Smith*, and that neither *Bell* or *Smith* had imposed the limitation set forth in *Ward*, 967 F.2d at 283-84, 967 F.2d at 283-84.

Rentz v. Spokane County, 438 F. Supp. 2d 1252 (D. Wash. 2006) emphasis added.

The Tenth Circuit's intent based *Trujillo* standard is likewise at odds with Second Circuit case law. In *Patel v. Searles*, 305 F.3d 130, 136 (2d Cir. 2002), the Court stated: "this Circuit has never held that a challenged action must be directed at a protected relationship for it to infringe on the right to intimate

association." This split is noted in decisions of the district courts in the Second Circuit:

> However, the *Trujillo* court's reasoning is not compelling. Clearly, the Supreme Court has held that § 1983 actions may not be brought under certain constitutional provisions based on negligent acts. See *Daniels v. Williams*, 474 U.S. 327, 329, 334, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986) (mere lack of due care does not implicate Due Process Clause of Fourteenth Amendment). Indeed, the jury in this case was specifically charged that Mayer could not be held liable if his actions were merely negligent. However, to require in this context, in addition to the intent to shoot with reckless disregard as to the consequences, a specific awareness on the defendant's part that the plaintiff had children who would be deprived of his companionship if he were killed would effectively nullify the right altogether in the wrongful death context. *See Smith*, 818 F.2d at 1420 n. 12 (rejecting *Trujillo's* logic and holding that "as long as state official's action which deprived the plaintiffs of their liberty was more than merely negligent, the plaintiffs can state a Section 1983 claim without further allegations that the official was trying to break up the family").

Greene v. New York, 675 F. Supp. 110 (D.N.Y. 1987)

In claims for deprivation of a Fourteenth Amendment right of familial association brought pursuant to 42 U.S.C. § 1983, persons in the Ninth and Second Circuits are held to a far different standard of pleading and proof than are persons in the Tenth Circuit. This significant split on an issue of fundamental rights must be addressed by this honorable court.

B. The Decision in the Court Below Undermines Decisions of this Court Regarding the Level of Intent Required in a Fourteenth Amendment Deprivation of Familial Relationship Claim.

The Tenth Circuit's ruling is in conflict with the rulings of this court which specifically provide there is no state of mind requirement as a prerequisite to a 1983 claim, and that a Fourteenth Amendment claim may be based on conduct greater than negligence but "less than intentional conduct." *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (U.S. 1998); *Daniels v. Williams*, 474 U.S. 327, 330 (U.S. 1986)

Trujillo and its progeny impose a mechanical intent based litmus test to claims for deprivation of a Fourteenth Amendment right of familial association brought pursuant to 42 U.S.C. § 1983. Courts following *Trujillo* apply this intent based "state-of-mind requirement" in all circumstances rather than performing the proper "classic fourteenth amendment analysis" which required a balancing of liberty interests against the relevant state interests. *Griffin v. Strong,* 983 F.2d 1540, 1547(10th Cir. 1993) (quoting *Youngberg v. Romero,* 457 U.S. 307, 321 (1982)).

Discarding the classic Fourteenth Amendment balancing of interests in favor of a strict state-of-mind based standard is in direct conflict with decisions of this honorable court:

> "In *Parratt v. Taylor*, we granted certiorari, as we had twice before, "to decide whether mere negligence will support a claim for relief under § 1983." 451 U.S., at 532. After examining the language, legislative history, and prior interpretations of the statute, we concluded that § 1983, unlike its criminal counterpart, 18 U. S. C. § 242,

> Contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. *Id.*, at 534-535."

Daniels v. Williams, 474 U.S. 327, 330 (U.S. 1986)

Replacing the classic Fourteenth Amendment balancing of interests with a strict state-of-mind intent based litmus test is contrary to decisions of this court recognizing that conduct greater than mere negligence, but less than intentional conduct can support a Fourteenth Amendment claim:

> Whether the point of the conscience-shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but "less than intentional conduct, such as recklessness or 'gross negligence,'" [internal citation omitted], is a matter for closer calls. To be sure, we have expressly recognized the possibility that some official acts in this range may be actionable under the Fourteenth Amendment, [internal citation omitted] and our cases have compelled recognition that such conduct is egregious enough to state a substantive due process claim in at least one instance.

County of Sacramento v. Lewis, 523 U.S. 833, 850 (U.S. 1998)

To the extent intent is required in a Fourteenth Amendment balancing test, the reckless conduct of a defendant may be sufficient under the facts of a given case to impose liability a the Defendants. *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (U.S. 1998) The holding of *County of Sacramento* is in substantial agreement with the standards imposed in due process cases in a variety of circumstances:

> Practically every court that has considered the issue has concluded that reckless intent may

violate section 1983. *See Torres Ramirez v. Bermudez Garcia,* 898 F.2d 224, 227 (1st Cir. 1990); *Wood v. Ostrander,* 851 F.2d 1212, 1214-15 (9th Cir. 1988), modified on reh'g, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990); *Nishiyama v. Dickson County, Tenn.,* 814 F.2d 277, 282 (6th Cir. 1987); *Bass v. Jackson,* 790 F.2d 260, 262-63 (2d Cir. 1986); *Davidson v. O'Lone,* 752 F.2d 817, 828 (3d Cir. 1984), *aff'd*, 474 U.S. 344 , 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); *White v. Rochford,* 592 F.2d 381, 385 (7th Cir. 1979); *Britt v. Little Rock Police Dep't,* 721 F. Supp. 189, 192 (E.D. Ark. 1989); *Martin A. Schwartz & John E. Kirklin*, 1 Section 1983 Litigation: Claims, Defenses, and Fees 3.4, at 127 & n.186 (2d ed. 1991). We have similarly concluded that recklessness states a claim under section 1983. *Harris v. Maynard,* 843 F.2d 414, 416 (10th Cir. 1988); *Archuleta,* 897 F.2d at 499. However, reckless intent does not require that the actor intended to harm a particular individual; reckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences.

See *Medina v. Denver*, 960 F.2d 1493, 1495-1496 (10th Cir. 1992):

Due to the preclusive administration of a state-of-mind intent based test set forth in *Trujillo*, the District Court below did not address whether the facts of the present case would be sufficient under a Fourteenth Amendment balancing test to support a claim of loss of association. However, it is clear that a reasonable jury could find the Respondents engaged

in conduct of at least a grossly reckless nature toward the Petitioners.

The state-of-mind intent based litmus test applied by the Tenth Circuit is contrary to this Court's decision in *Daniels v. Williams*, 474 U.S. 327, 330 (U.S. 1986) The exclusion of any balancing to determine if in fact reckless conduct would be sufficient to prove a claim in the circumstances of a given case is contrary to this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (U.S. 1998) The District Court below, pursuant to long standing case law of this court, should have conducted a proper Fourteenth Amendment balancing test to determine if the Defendants' conduct, as alleged and as supported by deposition, affidavit and other permissible evidence was sufficient to state a Fourteenth Amendment claim. Action by this honorable Court is required to bring the Tenth Circuit's case law into conformity with established Fourteenth Amendment jurisprudence.

CONCLUSION

For the foregoing reasons, a petition for certiorari should be granted.

Respectfully submitted,

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